

HOUSE BILL 3693  
By Overbey

AN ACT to amend Tennessee Code Annotated, Title 29,  
Chapter 26, Part 1, relative to health care liability.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, Chapter 26, Part 1, is amended by inserting the following as a new, appropriately designated section thereto:

29-26-\_\_\_\_. As used in this part, unless the context otherwise requires:

(a) "Health care provider" means a health care practitioner licensed, certified, or registered under any chapter of titles 63 or 68, a nongovernmental health care facility licensed under title 68, chapter 11, a nongovernmental mental health facility licensed under title 33, chapter 2, part 4, the employee of a health care provider involved in the provision of health care or a professional corporation or professional limited liability company as established pursuant to title 48.

(b) "Health care liability action" means any civil action against a health care provider or providers in which the claimant alleges injury related to the provision of or failure to provide health care services, regardless of the theory of liability on which the action is based. Any such civil action is subject to the provisions of this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint.

SECTION 2. The code commission is requested to delete the terms "malpractice," "medical malpractice," "malpractice action," and "medical malpractice action" wherever they appear in Tennessee Code Annotated, title 29, chapter 26, part 1, and to substitute instead the term "health care liability action."

SECTION 3. Tennessee Code Annotated, Section 29-26-119, is amended by deleting the section in its entirety and by substituting instead the following:

§ 29-26-119.

(a) In any health care liability action in which liability is admitted or established, the damages awarded may include, in addition to other elements of damages authorized by law, actual economic losses incurred by the claimant by reason of the injury. Actual economic losses include, but are not limited to, the costs of reasonable and necessary medical care, rehabilitation services and custodial care, loss of services, and loss of earned income. Evidence of such damages is admissible and such damages recoverable only to the extent that such losses are not paid, payable, replaced, or indemnified by insurance provided by a governmental or private employer, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimant or of the members of the claimant's immediate family and insurance to the extent that it was purchased, in whole or in part, privately and individually. Such recoverable damages shall not include expenses or charges to the extent that they have been discounted or forgiven for any reason, including, without limitation, discounts arising from a relationship with a health insurer or other payor.

(b) In any health care liability action in which liability is admitted or established, the damages awarded may include, in addition to other elements of damages authorized by law, noneconomic losses; provided, however, the damages awarded for such noneconomic losses shall not exceed a total of two hundred fifty thousand dollars (\$250,000) against all health care practitioners who are defendants, and shall not exceed a total of two hundred fifty thousand dollars (\$250,000) against all health care facilities that are defendants. The aggregate amount of damages recovered by a plaintiff for noneconomic losses in a health care liability action shall not exceed five hundred thousand dollars (\$500,000). The limitations of this subsection shall apply in the

aggregate to all claims arising from the same injury, regardless of the number of claims, claimants, plaintiffs, or beneficiaries.

(c) Damages for noneconomic losses shall include, but not be limited to, damages for physical and emotional pain and suffering, inconvenience, discomfort, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, punitive damages, and all other nonpecuniary losses of any kind or nature. Damages for noneconomic losses shall not include past or future:

(1) Medical expenses to the extent that they are otherwise recoverable, including rehabilitation and therapy;

(2) Lost past or future wages or earnings capacity;

(3) Other loss of income;

(4) Funeral and burial expenses;

(5) The economic value of services performed by the injured party but for the injury or death, including the cost of providing those domestic and other necessary services performed by the injured party without compensation; or

(6) Other similar actual monetary losses.

(d)

(1) In any health care liability action the trial court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent be paid in whole or in part by periodic payments rather than by a lump sum payment if the award equals or exceeds seventy-five thousand dollars (\$75,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for such future

damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(2)

(A) The judgment ordering payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(B) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in item (A), then the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(3) Money damages awarded shall not be reduced, or payments terminated, by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to the judgment creditor's death. In such cases, the court that rendered the original judgment may, upon petition of any party in interest,

modify the judgment to award and apportion the unpaid future damages in accordance with this subsection.

(4) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given pursuant to subdivision (1) shall revert to the judgment debtor.

(5) Nothing in this section shall preclude the parties to a health care liability action, in a settlement, from agreeing to the satisfaction of the award by future periodic payments subject to approval by the court.

(6) As used in this subsection:

(A) "Future damages" includes damages for future actual economic losses incurred by the judgment creditor and noneconomic damages awarded to the judgment creditor.

(B) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(e) In the event of an appeal of a judgment entered against a health care provider, the health care provider shall not be required to post a bond or other security in the amount of more than one million dollars (\$1,000,000) in order to stay execution pending the appeal.

SECTION 4. Tennessee Code Annotated, Section 29-26-120, is amended by deleting the section in its entirety and by substituting instead the following:

Compensation for reasonable attorneys' fees in the event an employment contract exists between the claimant and claimant's attorney on a contingent fee arrangement shall be awarded to the claimant's attorney in a health care liability action in an amount to be determined by the court on the basis of time and effort devoted to the

litigation by the claimant's attorney, complexity of the claim, and other pertinent matters in connection therewith, not to exceed the following limitations:

- (1) Forty percent (40%) of the first fifty thousand dollars (\$50,000) of damages recovered;
- (2) Thirty-three and one-third percent (33 1/3%) of the next fifty thousand dollars (\$50,000) recovered;
- (3) Twenty-five percent (25%) of the next five hundred thousand dollars (\$500,000) recovered;
- (4) Fifteen percent (15%) of any amount by which the recovery exceeds six hundred thousand dollars (\$600,000).

Such limitations shall apply regardless of whether the recovery is by means of settlement, arbitration, or judgment, and regardless of whether the person for whom the recovery is made is a responsible adult, infant, or person of unsound mind.

SECTION 5. Tennessee Code Annotated, Section 29-26-115(b), is amended by deleting the subsection in its entirety and by substituting instead the following:

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state, or a contiguous bordering state, a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. As to the facts that must be established pursuant to subsection (a)(1) and (a)(2), the expert witness must also have been practicing the same specialty as the defendant. This rule shall also apply to expert witnesses testifying on behalf of the defendant. The court may waive this subsection

when a party establishes that, despite diligent efforts to locate such a witness, the appropriate witnesses otherwise would not be available.

SECTION 6. Tennessee Code Annotated, Section 29-26-117, is amended by deleting the section in its entirety and by substituting instead the following:

§ 29-26-117.

In a health care liability action the initial complaint filed by the plaintiff shall state a demand for a specific sum, but such demand shall not be disclosed to the jury during a trial of the case, notwithstanding the provisions of § 20-9-302 to the contrary. An action against an attorney for legal malpractice shall not arise based solely on the fact that the damages awarded in the underlying health care liability action exceeded the amount sought in the ad damnum of the complaint filed in such underlying action. The plaintiff may not attempt to seek recovery on this difference from the attorney unless the attorney's conduct in the underlying action constituted fraud or willful misconduct.

SECTION 7. Tennessee Code Annotated, Title 29, Chapter 26, Part 1, is amended by adding the following as a new section:

§ 29-26-\_\_\_\_.

(a) In any health care liability action against a health care provider, the plaintiff shall be required to file with the complaint, or within ninety (90) days after the complaint is filed, either:

(1) An affidavit of an expert competent to testify pursuant to 29-26-115(b), which affidavit shall specifically describe for each defendant at least one (1) negligent act or omission claimed to have caused the claimant's injuries including, without limitation, the date of the act or omission and the factual basis for each such claim, including specific identification of the medical records upon which such opinion is based; or

(2) A bond in the amount of ten thousand dollars (\$10,000) for each defendant for costs or damages that may be assessed against the claimant or claimant's attorney in the event that the lawsuit is dismissed or otherwise determined to be without merit.

(b) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains asserts, by motion to dismiss or motion for summary judgment, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty (30) days of service of the motion alleging that the affidavit is defective, or the filing of a bond as provided in (a)(2).

(c)

(1) In the event that a health care liability action is filed without an affidavit in accordance with subdivision (a)(1), or with an affidavit filed in bad faith, and is ultimately dismissed in favor of the defendant, the defendant may be entitled to an award of damages resulting from said filing, including without limitation attorney fees and other defense costs, the reasonable value of the defendant's time spent in the defense of the case, and damages relating to the time that is reasonably likely to be spent in providing information relating to the lawsuit in future credentialing applications. Such bond may be used toward satisfaction of damages that may be awarded pursuant to this subsection, but shall not be a limitation on the amount of said award.

(2) The amount of said damages shall be determined by the trial judge in a hearing to be scheduled promptly upon the defendant's motion for assessment of costs, which motion shall be accompanied by an itemization of the costs sought. The trial judge shall make a determination as to the amount of the

damages, and, if applicable, as to whether the affidavit filed in accordance with subdivision (a)(1) above was filed in bad faith. “Bad faith” shall be presumed when the expert providing the affidavit was not supplied with appropriate medical records for review, when the affidavit fails to comply with the requirements of subdivision (a)(1), or when the position taken in the affidavit is otherwise so lacking in merit as to make an award of damages appropriate.

SECTION 8. Tennessee Code Annotated, Title 29, Chapter 26, Part 1, is amended by adding the following as a new section:

Section 29-26-\_\_\_\_.

(a) In any action for damages alleging professional negligence against a health care provider, the plaintiff shall file, contemporaneously with the filing of the complaint, a HIPAA-compliant medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.

(b) The authorization shall provide that the attorney representing the defendant is authorized to obtain protected health information, including, but not limited to, mental health and drug and alcohol abuse treatment records, contained in medical records to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the complaint which pertain to the plaintiff or, where applicable, the plaintiff’s decedent whose treatment is at issue in the complaint. The authorization shall include the defendant’s attorney’s right to interview, outside the presence of the plaintiff or the plaintiff’s counsel, the plaintiff’s or decedent’s treating health care provider or health care providers with regard to the care and treatment of the plaintiff or, where applicable, the plaintiff’s decedent.

(c) The authorization shall provide for the release of all health care information, including, but not limited to, mental health and drug and alcohol abuse treatment records, and shall authorize the release of such information by a health care provider maintaining health care records of the plaintiff or the plaintiff's decedent.

SECTION 9. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 10. This act shall take effect January 1, 2007, the public welfare requiring it.